

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 167/08
5141567

BETWEEN DB BREWERIES LIMITED
Applicant

AND NEW ZEALAND
AMALGAMATED
ENGINEERING PRINTING &
MANUFACTURING UNION
Respondent

Member of Authority: Helen Doyle

Representatives: Rob Towner, Counsel for Applicant
Tony Wilton, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 7 November 2008 from Applicant
7 November 2008 from Respondent

Determination: 10 November 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] DB Breweries Limited (DB Breweries) wants four of its trades staff employees at its Mainland Brewery in Timaru, two fitters and two electrical staff, who are members of the New Zealand Amalgamated Engineering, Printing & Manufacturing Union (EPMU) to work two temporary eight hour rotating shifts Monday to Friday until at least Christmas 2008 to meet business demands and in response to increased production requirements and current production pressure.

[2] DB Breweries has consulted with the EPMU and its trade staff for some time but no agreement has been reached for the employees to work the shift. On 24 October 2008, DB Breweries' manager, Mr Haack-Pedersen, issued a memorandum to the affected trade staff advising that, following consultation and a call for volunteers, DB Breweries had decided to

implement the 2 x 8 shift system effective from 3 November 2008 and that the staff were required to comply with the roster.

[3] DB Breweries, EPMU and the Service and Food Workers Union are party to the 2007/2009 collective employment agreement (the collective agreement). EPMU responded to Mr Haack-Pedersen's and said that it did not accept that DB Breweries could require its members, who are daywork employees, to work shifts without their agreement.

[4] On 3 November 2008, DB Breweries lodged with the Authority a statement of problem seeking resolution of the dispute between the parties about the proposal to introduce the two temporary eight hour rotating shifts at the plant. Urgency was requested and was granted in the circumstances. An affirmation of Kim Haack-Pedersen was lodged in support of the statement of problem. EPMU did not contest in the statement in reply the reason for introducing the shift system or the process that was followed. Both parties agreed to three additional facts and the matter was limited to an interpretation of the relevant provisions of the collective agreement.

[5] Mr Towner and Mr Wilton agreed that the matter could be dealt with on the papers. Submissions were lodged and Mr Towner and Mr Wilton spoke to their respective submissions during a telephone conference with the Authority on 7 November 2008. The Service and Food Workers Union has received notification of the dispute under s 129 (2) of the Employment Relations Act 2000.

The issue

[6] The issue for the Authority to determine is whether under clause 3 of the collective agreement DB Breweries is able to change the hours of the four trade staff employees and require them to work shifts.

Interpretation of contract

[7] Mr Towner correctly submits that interpretation of collective agreements is well established by case law. Mr Towner and Mr Wilton both referred to the judgment of Colgan J in *ASTE v. Hampton* [2002] 1 ERNZ 491 where the well-established principles were applied.

[8] In applying the well-established principles and to ascertain the intention of the parties, the Authority will start with the words and consider the whole of the collective

agreement and the surrounding circumstances at the time the agreement was entered into to make sure that nothing requires modification of their ordinary and natural meaning. The Authority will take an objective approach as to the meaning of the words and ask what a reasonable person in the field, knowing all the background, would take the words to mean. The interpretation should not be unduly narrow but in accordance with business commonsense.

The collective agreement

[9] Clause 3 of the collective agreement is headed DEFINITIONS AND HOURS OF WORK. Sub clause 3.1 is headed DAYWORK EMPLOYEES and defines and prescribes the hours of work for full time, part time, casual and temporary day work employees. Clause 3.2 is headed SHIFTWORK EMPLOYEE and describes shift work employees' work patterns and ordinary hours of work.

[10] Clause 3.3 is headed CHANGES TO HOURS OF WORK and provides:

- 3.3.1 *The company recognises that a change to an employee's ordinary hours of work may cause disruption to his/her personal domestic arrangements.*
- 3.3.2 *In an effort to ensure that the employee's domestic arrangements are given due consideration where a change to working hours is required, the following procedure will be followed:*
 - (a) *Where a change to current work hours is necessary, the company will fully discuss the reasons for the change and seek competent volunteers to move to the new work hours.*
 - (b) *Where there are insufficient competent volunteers forthcoming, the company will consult with those individual employees most likely to be affected by the change in an effort to reach a satisfactory arrangement.*
 - (c) *If circumstances permit, an employee who has changed his/her hours of work will be given first preference to return to his/her former hours of work.*

DB Breweries' submissions

[11] Mr Towner submits that clause 3.3 governs changes to hours of work and gives DB Breweries the right to change employees' working hours. He submits that the wording of clause 3.3 is unambiguous and is to be given its ordinary and natural meaning which is that DB Breweries has the right to require employees to work shifts regardless of whether they are presently working shifts.

[12] Mr Towner submits that the position of the EPMU that clauses 3.1 and 3.2 create categories of employees and that these categories cannot be changed without an employee's agreement requires a reading down of clause 3.3 and that there is no basis to apply such a restriction into the clause. Mr Towner submits that, had the parties intended such an limitation, then that could easily have been made.

EPMU submissions

[13] Mr Wilton submits that clause 3.3, properly interpreted in its context within clause 3, refers to changes within the parameters of the ordinary hours of work prescribed for daywork employees or prescribed for shiftwork employees and that clause 3.3 does not give DB Breweries the power to change daywork employees' ordinary hours of work to make them shiftwork employees.

Whether, under clause 3 of the collective agreement, DB Breweries is able to change the hours of work the four trade staff employees and require them to work shifts.

[14] The phrase, *change to an employee's ordinary hours of work* in clause 3.3.1 could give a first impression that DB Breweries has the right to introduce any change to ordinary hours without restriction. Clause 3.3 must however be considered and read in the context of clause 3 of the collective agreement and any surrounding circumstances that would have been apparent to the parties at the time they entered into the collective agreement.

[14] Clause 3.1.1 sets out the full time daywork employees' ordinary hours of work as 40 per week of which not more than eight consecutive hours shall be worked on each day Monday to Friday from 6am to 6pm. The parameter of the hours of work within which a daywork employee could be required to work is wider than the hours a full time daywork employee would actually be working and wider again for part time, casual and temporary daywork employees. For the latter category of day work employees, the ordinary hours of work are defined as between Monday and Friday, 6am to 10pm.

[15] Clause 3.2, provides that shiftwork employees are employed on work patterns where their ordinary hours of work fall wholly or partially outside the hours 6am to 6pm for full time employees or 6am to 10pm for part time, casual or temporary employees, or where the ordinary hours of work are part of an alternating or rotating shift pattern. The ordinary hours of work as a shiftwork employee shall not exceed five shifts worked on consecutive days of not more than eight hours each to be worked between the hours of 10pm Sunday and 6am the following Saturday. Shift workers are paid a shift allowance for each shift worked and they

are also entitled to other benefits in the collective agreement. The parameter of hours within which a shift work employee could be required to work is wider than the hours a shift work employee would actually be working.

[16] Clause 3.2.1 is the first subclause under clause 3.2. It provides that shift work shall be worked as required by the company in accordance with the agreement. Mr Towner submits that this clause specifically confirms that the company may require day work employees to undertake shift work.

[17] Objectively considered I accept Mr Wilton's submissions that had the parties intended that clause to apply to daywork employees and give DB Breweries the power to require daywork employees to undertake shifts, then it would not have been placed under the heading *shift work employees* and given the same numbering pattern under that clause as other clauses relating to shiftwork employees.

[18] The collective agreement provides entitlements for shift work employees that do not apply to daywork employees. Some of these entitlements apply on a per shift basis. I have considered whether the wording in that clause supports an intention that DB Breweries can require daywork employees to work shifts. I accept Mr Wilton's submission that these restrictions, where they apply, are a practical way of recognising that shift work employees may not always be working shifts that qualify them for an entitlement. There are also part time, casual and temporary employees who are shiftwork employees and day work employees may also from time to time agree to work the shifts. I do not find objectively assessed that the way those entitlements are expressed changes the distinction between the two categories of employee.

[19] Mr Towner submits that *Cuttriss v. Carter Holt Harvey Ltd* [2007] 1 ERNZ 233 is authority that supports DB Breweries' submission that there is no ground for restricting the operation of clause 3.3 based on an argument that the categories of daywork and shiftwork employees are fundamental terms of employment. Mr Towner accepts that *Cuttriss* is not directly on point.

[20] I find that there are two distinct categories of employee in the collective agreement, daywork employees and shiftwork employees. Classification of an employee as either a daywork employee or a shiftwork employee is an express term of employment. Both categories of employee have distinct definitions and different parameters in terms of ordinary hours of work and days of work.

[21] I have also taken into account the following relevant circumstance which would have been apparent to the parties at the time they entered into the collective agreement in 1997. Since 1992, brewery trades employees, other than a recent employee who has a different arrangement, have never been required to work shifts except for six weeks during March, April and May 2008 when they worked rotating shifts by agreement. The brewery trades employees have been solely daywork employees.

[22] I find objectively assessed that the intention of the parties under clause 3.3 read in the context of the collective agreement and taking into account the relevant circumstances at the time the collective agreement was entered into was that there could be changes to the hours of work within the parameters prescribed for daywork employees under clause 3.1 or for shiftwork employees under clause 3.2. The intention of the parties under clause 3.3 was not to change the daywork employees ordinary hours of work to make them shiftworkers.

[23] That is not to say that daywork employees cannot agree to work shifts on a temporary basis or to become shiftwork employees. Mr Wilton specifically accepted that this could occur by agreement. The effect of the determination is that daywork employees cannot be required to work shifts under clause 3.3.

Determination

[24] The dispute is resolved in favour of the EPMU.

[25] Both parties wanted the legal question to be answered before attending mediation. Mr Wilton recognised and accepted in his submissions that DB Breweries had a valid reason for wanting the trade staff employees to work shifts and that mediation assistance may be helpful in that regard. It would seem appropriate that mediation now take place.

Costs

[26] I reserve the issue of costs.

Helen Doyle
Member of the Employment Relations Authority